IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 98 of 1985

HAZI MUKHTIYAR ALI
V/S
SMT SAYARA

Mr. MC BHOOT, for the appellant / petitioner

Mr. RR NAGORI, for the respondent

Date of Order : 26.10.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This appeal was admitted on 8.10.1985. However, during pendency of the appeal, an application was filed by the respondent on 21.9.2005, under O. 22 Rule 10(A) C.P.C., stating that respondent no. 2 Abdul Naeem had expired, and no steps have been taken. Thereafter on 13.2.2006 application was filed on behalf of the appellant for substitution of legal representatives of deceased Abdul Naeem. This application was contested on behalf of the respondents by filing reply, interalia contending factual allegations of the application to be incorrect. Ultimately on 24.7.2006, when the matter came up before me, learned counsel for the appellant submitted, that the name of deceased respondent no.2 be struck off. Accordingly his name was struck off, and it was specifically directed that the consequence of striking of the name shall obviously be

considered at the time of hearing. Thereafter the matter came up for hearing on 3.10.2006. On that day the counsel for the appellant was heard, and the hearing continued. Then, on 9.10.2006, learned counsel for the appellant so also Mr. Nagori, each filed an application, and both the learned counsel wanted time to file reply. Thereafter the matter was simply passed over for the day. The respondent filed reply to the appellant's application on 11.10.2006. However, no reply was filed by the appellant to the application of the respondent dt. 9.10.2006, and the matter was heard.

It may be noticed that on 3.10.2006 an objection was raised by the learned counsel for the respondent, that the respondent no.2 has expired, and his legal representatives having not brought on record, rather his name having got struck off, and impugned decree being joint in favour of all the respondents, the appeal abates as a whole.

It is in this sequence that on 9.10.2006, the application has been filed by the respondent alleging the same thing, and also invoking the observations made in the order dt. 24.7.2006, and contending, that on account of non impleadment of legal representative of deceased respondent no.2, qua his heirs the decree has become final, and in the event of appeal being heard on merits, there is a

possibility of contradictory decrees coming into existence, as such the whole appeal abates. Likewise, the learned counsel for the appellant also filed an application on 9.10.2006 itself, purportedly under O. 1 Rule 10 read with Section 151 C.P.C. alleging that sole plaintiff Abdul Naeem expired on 28.6.2005, and the appellant came to know of his death on 2.1.2006, they moved the application for substitution on 13.2.2006, to which a reply was filed, and on 24.7.2006, when the matter came up, the Court was pleased to remove the name of Abdul Naeem from the array of the respondents. Then, it was pleaded, that an application for substitution was also filed by the present appellant in some other appeal pending in the court of Addl. District Judge No.1, Jodhpur, wherein on the direction of the Court, the respondents gave out the correct name of legal representatives as mentioned in para-3 of the application. Then, it was pleaded that since the estate of sole plaintiff Abdul Naeem is already sufficiently represented, therefore, the question of abatement does not arise, and it would be in the interest of justice that the heirs of Abdul Naeem may be permitted to be added as respondents, and it was prayed that the heirs of respondent Abdul Naeem may kindly be ordered to be added as respondents. Reply to the application was filed, contending that information about death of Abdul Naeem was given by filing application on 21.9.2005, after giving its copy to the counsel for the appellant. Thus, it is wrong to say that appellant came to

know about the death of Abdul Naeem on 2.1.2006. Then, it is contended, that in the other appeal despite respondent's filing the correct names of legal representatives on 13.2.2006, the appellant has not cared to bring legal representatives on record and for setting aside the abatement. Then, in para-4 it is alleged that the estate of deceased Abdul Naeem is not sufficiently represented, and the appellant cannot be permitted to implead the heirs of Abdul Naeem as respondents under O. 1 Rule 10 C.P.C. because there is specific provision under O. 22 Rule 9 C.P.C. for setting aside the abatement, for which appellant has not filed any application. Thus, it was prayed that the application be dismissed.

Thus, the whole argument and counter argument of the learned counsel for either side were on the aspect, as to whether the appeal abates, or not, and as to whether the appeal abates as a whole or not. Obviously it is not in dispute that respondent no. 2 Abdul Naeem expired, application for substitution of his legal representative was filed, and then appellant himself requested for striking out the name of respondent no.2, and it was accordingly struck off, making it specifically clear, that the consequence of striking of the name shall be considered at the time of hearing.

Before proceeding further I may make it clear,

that I am not taking cognizance of wrong mention of the fact in the application of the appellant dt. 9.10.2006, about the deceased Abdul Naeem being the sole plaintiff, as alleged in the application, more than once. It is a different story, that if Abdul Naeem was sole plaintiff, admittedly his legal representatives having not been brought on record, the appeal could possibly not be survived. Be that as it may.

It was contended by the learned counsel for the appellant that the suit was filed by the plaintiff Abdul Raheem who expired during pendency of the suit, and the respondents no. 1 to 12 were brought on record as his legal representatives. That being the position, the deceased Abdul Naeem was also one of the legal representatives, representing the estate of the deceased Abdul Raheem, in that view of the matter, since the remaining 11 legal representatives are already representing the entire estate of Abdul Raheem, even if the legal representatives of Abdul Naeem have not been brought on record, or his name has been struck off, there is no abatement, much less abatement of entire appeal. Learned counsel relied upon the judgments of Division Bench of this Court in Lachhmi Devi Vs. Ms. S.Rajmal Golecha reported in RLW 1981-204, and those of Hon'ble the Supreme Court in, N.K. Mohd. Sulaiman Vs. N.C. Mohd. Ismail reported in AIR 1966 SC-792, Sardar Amarjit Singh Kalra Vs. Pramod Gupta reported in (2003) 3 SCC-272,

State of Haryana Vs. Gurcharan Singh (2004) 12 SCC-540, Vidyawati Vs. Man Mohan reported in (1995) SCC-431, and Mithailal Dalsangar Singh Vs. Annabai Devram Kini reported in (2003) 10 SCC-691, and submitted, that firstly there is no abatement, secondly even if it is taken hyper technically, that abatement is there, consideration of substantial justice should prevail, and even at this stage the legal representative should be brought on record, may be even under O. 1 Rule 10.

On the other hand, learned counsel for the respondent contended that the parties are Muslim, specially the plaintiff is Muslim, and under the Mohammedan Law estate devolves on the heirs of the deceased at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased, and since the heirs succeed to the estate as tenants in common, in specific shares, there is no question of the estate of Abdul Naeem being represented by the other heirs of Abdul Raheem. According to the learned counsel true it is that 12 heirs were brought on record as heirs of Abdul Raheem, but then they were not jointly representing the estate of deceased plaintiff Abdul Raheem, but were representing the estate in accordance with the share of each one of them, in which the estate devolved on them on death of Abdul Raheem. In that view of the matter, since Abdul Naeem was having specific share in the estate inherited by him on death of

his father, on his death, his share devolved on his legal representatives, detailed in the application dt. 9.10.2006, and was not available for being represented by the other surviving heirs of the deceased Abdul Raheem. According to the learned counsel, that being the position, and since the decree passed by the learned trial court being joint in favour of all the plaintiffs, not capable of being bifurcated, the obvious consequence is, that as against the heirs of the deceased Abdul Naeem, the impugned decree has become final, not only by not bringing on record his legal representatives, but also by making an express request by the appellant to strike out the name of the respondent no.2 Abdul Naeem. Consequently, if the appeal is heard on merits, it is likely to result into bringing into existence two inconsistent decrees; one having become final in favour of the heirs of the deceased Abdul Naeem, and the other that may be passed by this Court in the event of appeal being allowed, and therefore, the appeal abates as a whole, and is accordingly required to be dismissed as prayed in the application dt. 9.10.2006. Learned counsel for the respondent also placed reliance on the judgment of Hon'ble the Supreme Court, in Union of India Vs. Shree Ram Bohra reported in AIR 1965 SC-1531, and also referred to Section 41 of the Mohammedan Law by Mulla 19th Edition.

I have considered the submissions, and have gone through the various judgments cited at the Bar.

To start with I may refer to Section 41 of Principles of Mohammedan Law by Mulla which reads as under:-

> "41. Devolution of inheritance:- Subject to provisions of secs. 39 and 40, the whole estate of a deceased Mohammedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s. 118), devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares."

Obviously thus, when the heirs succeed to the estate in common in specific shares, there is no question of representation of the estate by some of the heirs. However, Hon'ble the Supreme Court in Mohd. Sulaiman's case has little deviated from this proposition, to certain extent, in certain circumstances. Strong reliance was placed by the learned counsel for the appellant on this Mohd. Sulaiman's case. Therefore, I feel it appropriate to discuss the judgment in Mohd. Sulaiman's case, in bit detail. In this case certain immoveable property was mortgaged by three persons on 21.8.1933, to secure repayment of Rs. 20,000/-. One of the mortgagors died on 19.11.1937. Then, on 12.7.1940 mortgagee commenced an action for enforcement of the mortgage against the remaining two mortgagors, three widows of the deceased mortgagor, and daughter of the deceased as well. Preliminary mortgage decree was passed on 25.11.1940, which

was made absolute on 11.10.1941, in execution of the decree the property was sold at a court auction, and was purchased by the mortgagee with leave of the court. The property thereafter changed hands in sequence. Thereafter one of the sons of the deceased mortgagor instituted a suit in the year 1950, for decree for partition of the mortgaged properties by metes and bounds, and in the alternative for declaration that he was entitled to redeem the mortgage or portion thereof, equal to his share in the mortgaged properties, and for an order against the original mortgagee and alienees to render a true and correct account of the income of the properties, and for a further declaration that the earlier execution proceedings were null and void. In this suit other son of the deceased mortgagor was also impleaded as party, apart from the other heirs of the deceased mortgagor. It was in this suit that the learned trial court held, that the plaintiff was sufficiently represented by the three widows and daughter of mortgagor in the previous suit, and is bound by the decree, and the sale in execution thereof, even though he was not impleaded as party. The High Court confirmed the decree, and the matter was carried to Hon'ble the Supreme Court, in these facts Hon'ble the Supreme Court, in para-5 held, that the accepted, and well settled principles are, that the estate of a Muslim dying intestate devolves under the Islamic law upon his heirs at the moment of his death i.e. the estate vests immediately in each heir in proportion to the shares

ordained by the personal law and the interest of each heir is separate and distinct. It was also held that each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate. It was also noticed that a creditor of a Muslim dying intestate may sue all the heirs of the deceased, and where the estate of the deceased has not been distributed between the heirs he may execute the decree against the property as a whole without regard to the extent of the liability of the heirs inter se, and that creditor is, however, not bound to sue all the heirs, the creditor may sue some only of the heirs and obtain a decree against those heirs and liability for satisfaction of the decree may be enforced against individual heirs in the property held by them proportionate to their share in the estate. It was also held, that it is also settled, that where the defendant in an action dies after institution of the suit, the creditor after diligent and bona fide enquiry impleads some but not all the heirs as legal representatives, the heirs so impleaded represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on the record, and this very principle was applied in para-17 of the judgment. In my view this judgment does not help the appellant at all, inasmuch as, it is not the case of the death of the defendant where the

plaintiff may have sued some heirs. Secondly, it is not the case where after death of the respondent, the appellant may have brought on record some of his heirs as legal representatives, purporting to have done so after diligent and bona fide enquiry, in which case the legal representatives on record, on the authority of this judgment, represent the estate of the non impleaded legal representatives. On the other hand, the present is a case where the appellant is conscious of the requirement of the impleading of legal representatives, and also filed an application in that behalf on 13.2.2006, but then, for reasons best known, or as standing legally advised, of free volition, on 24.6.2006 requested the Court to strike out the name of the deceased. Since it was so done at the risk of the appellant himself, it was clarified, that the consequences shall be considered at the time of hearing. Thus, in my view the theory of sufficient representation, to the extent propounded by Hon'ble the Supreme Court, even if invoked, is not applicable in the present case, as none of the legal representatives of the deceased respondent Abdul Naeem are on record, rather his name has been got struck off. Then, in Lachhmi Devi's case, suit for rendition of the account was filed, and during course of trial one of the defendants died and his sons were brought on record. The learned trial court dismissed the suit against the other defendants, but passed a preliminary decree declaring the plaintiff to be entitled to have the

accounts taken of the transactions between the plaintiff Company and Ganesh Narain, in his capacity as a partner of the firm. Then, after receipt of the report from the Commissioner a decree for Rs. 9,992.53 was passed against Dhannalal and Brijlal, in their capacity as legal representatives of deceased Ganesh Narain. Then, Dhannalal filed an appeal and Brijlal, one of the appellants died on 22.10.1966, and the advocate through whom the appeal was filed died on 1.6.1967. Obviously when the appeal came up for hearing on 10.10.1967, nobody appeared for the appellant, and the appeal was dismissed for want of prosecution. Then, on 9.11.1967 application was filed by persons including legal representatives of Brijlal, for readmitting the appeal on its original number and setting aside the order dismissing the appeal for non prosecution, and for bringing on record the legal representatives of Brijlal, and for substituting their names in place of Brijlal, and setting aside the order of abatement of the appeal. It is in these facts, that the question was examined as to whether the appeal abates or not, and it was considered that when the decree is passed against estate of the deceased in the hand of legal representatives, the question which needs to be considered is, whether the estate of the deceased stands sufficiently represented by the appellants who are already on record, and if it is so, and if the court comes to the conclusion that it stands sufficiently represented, the legal representatives might

be on record in another capacity, and the other heirs and legal representatives may be brought on record even after the expiry of period of limitation, and the proceedings will not abate. In my view this judgment also does not help the appellant. The obvious reason is, that in that case application was filed for bringing legal representatives, may be belatedly, apart from the fact that decree was against the estate of the deceased, which was found to be sufficiently represented by the other persons already there on record. As against which, as noticed above, in the present case the parties being Muslims, and the heirs of the deceased plaintiff Abdul Raheem inherited estate in the proportion of their respective shares, the estate devolved on Abdul Naeem, devolves on his legal representatives, as heirs of Abdul Naeem, and in absence of his legal representatives being party in the appeal, his estate could possibly be not represented by the other heirs of Abdul Raheem. Coming to the judgment in Vidyawati's case, this in my view is not at all relevant to the controversy involved in the present case, inasmuch as, in that case the question was as to whether the person impleaded on record as legal representative is entitled to take all the defenses which were available to the deceased, and it was found that if the legal representative intends to make any personal or individual defence dehors the defence available to the deceased, he/she must get impleaded in his/her personal or independent capacity under O. 1 Rule 10 or retain the right

to file independent suit, asserting his/her own right. In the present case the heirs of the deceased Abdul Naeem have not at all come on record, to get themselves impleaded as party. Then, Mithailal's case, in my view, also does not help the appellant, inasmuch as in this case the principles have been propounded about non requirement of the filing separate application for setting aside abatement and non requirement of passing any specific order dismissing the same as abated; consequences of bringing on record the legal representatives in one proceedings, on the other cross appeal and suit etc. Then considerations required to be taken into account while adjudicating upon the sufficient cause for setting aside the abatement were laid down, and it was held that the provisions of abatement are to be strictly construed and the prayer for setting aside abatement/dismissal consequent on abatement to be considered liberally. Suffice it to observe, that in the present case rather the application for bringing on record the legal representatives was not pursued, and prayer was made to strike out the name of the deceased respondent Abdul Naeem. Therefore, there is no question of invoking the principles laid down in Mithailal's case. Coming to Gurcharan Singh's case and Sardar Amarjit Singh's case, the facts of these cases are distinguishable; inasmuch as in Gurcharan Singh's case it was found by the Hon'ble the Supreme Court, that after the death of respondent no.5 the share continued to be represented through respondents no.

1, 2, 3, 4 and 6, hence the appeal had not abated. While in Sardar Amarjit Singh's case there were various claimants; some of whom had died during pendency of the appeal, and it was found, that each one had his own claim, and simply because the court adjudicated them collectively, one claimant cannot suffer for any fault of other; obviously because the case of each claimant stood on independent footing. Thus these two judgments need not detain me at all.

Having discussed the judgments of Hon'ble the Supreme Court, I am now left with considering the circumstances of the present case. As noticed above, on death of original plaintiff, his heirs were brought on record, being 12 in number, and as held by Hon'ble the Supreme Court, in Mohd. Sulaiman's case, that it is settled law that estate devolves under the Islamic law at the moment of his death, and the estate vests immediately in each heir, in proportion to the shares ordained by the personal law, and the interest of each heir is separate and distinct, and therefore, the other descendants of Abdul Raheem cannot be said to be representing the estate coming to the share of Abdul Naeem, on death of Abdul Naeem. Admittedly none of the heirs of Abdul Naeem are on record, even otherwise, in any other capacity. Therefore obviously, so far Abdul Naeem is concerned, the appeal against him automatically abates.

Then, examining the impugned decree, it is obviously clear, that a joint decree has been passed in favour of all the plaintiffs, against the defendants, and that decree cannot be bifurcated in favour of individual descendants of the plaintiff, in proportion to his share of inheritance, with the obvious result, that if the appeal is heard on merits, there is clear possibility of coming into existence of two conflicting decrees; one having become final in favour of the heirs of Abdul Naeem, to the extent of the share of inheritance of Abdul Naeem, and other that may happen to be passed against the other descendants of Abdul Raheem, and therefore, the entire appeal is liable to be dismissed, as having become abated in toto. I am fortified in my view, by the consistent series of judgments of Hon'ble the Supreme Court, including those in State of Punjab Vs. Nathu Ram, reported in AIR 1962 SC-89, Ram Sarup Vs. Munshi, reported in AIR 1963 SC-553, and Shree Ram Bohra's case. This is one aspect of the matter.

The other equally important aspect of the matter which has not been argued by the learned counsel for the respondent is, viz. that admittedly the order dt. 24.7.2006 is never sought to be recalled, and obviously the order has been obtained by free exercise of discretion by the appellant, praying for striking out the name of respondent no.2. The obvious consequence of the striking out the name of respondent no. 2 is, as if he is not a party to the

appeal at all. As noticed above, since the decree is joint and indivisible, in favour of the plaintiffs, to say the least, with striking out name of respondent no.2, one of the co-plaintiffs, the appeal can very well be said to have become incompetent.

Thus, taken from any stand point, the application filed by the respondent on 9.10.2006, is required to be allowed, and the one filed by the appellant is required to be dismissed.

Accordingly, the two applications are disposed of as above, and the appeal is dismissed. Parties shall bear their own costs.

(N P GUPTA),J.

/Sushil/